

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S REQUEST
FOR IMMEDIATE CLARIFICATION OF FEBRUARY 26, 2003 ORDER ON
COMPLAINT COUNSEL'S MOTIONS FOR DEFAULT JUDGMENT AND FOR
ORAL ARGUMENT, AND IN RESPONSE TO ORDER DENYING REQUEST
FOR CLARIFICATION

At noon yesterday, Complaint Counsel filed a "Request for Immediate Clarification." Your Honor denied that request, and correctly so. To the extent the Request sought to clarify that "these patents" as used in paragraphs 2 and 3 of the February 26, 2003 Order referred to the "patents held or applied for by Rambus" described in paragraph 1 of that same Order, Complaint Counsel's request plainly would have added only self-evident detail, and nothing of substance.

However, Complaint Counsel's Request *might* be read to seek more than just minor clarification or the addition of self-evident detail. For that reason, Respondent requested an opportunity to respond to the Request. For instance, Complaint Counsel sought to add an entirely new rebuttable presumption. Complaint Counsel also sought to have Your Honor find that Rambus "participat[ed] in JEDEC's development of RAM standards," which might mean something different than that Rambus employees attended JEDEC meetings between December 1991 and December 1995, after which no Rambus employee

attended a JEDEC meeting. And, it might have been meant to suggest that RAM meant something more than DRAM, or SDRAM. Complaint Counsel's suggested change also might have been meant – or later be argued by Complaint Counsel to have meant – that Your Honor found that Rambus actually participated in drafting standards, or in making proposals for standards, or in voting on standards that were proposed, rather than just being in attendance. If Complaint Counsel intended this, they would have been overreaching, because there is no evidence to support this, because they offered no such evidence in their original moving papers (and certainly not in their Request), and because there is absolutely no need for an evidentiary sanction with respect to what happened at JEDEC meetings, since those facts can be proven by JEDEC minutes and the recollections of numerous persons in attendance.¹

Although we hope they would not, Complaint Counsel might later try to argue that Your Honor implicitly granted their Request to modify the February 26 Order in these substantive ways by the inclusion, in Your Honor's February 27 Order, of the language that "if [the Request were] granted, it would only add self-evident detail."

Were Your Honor to continue hearing this matter after today, which we understand you will not, Respondent would not trouble you with this response or burden an already overburdened record with more paper; Your Honor knows what you intended in the Order. But, as we all understand, Your Honor has elected to pursue a well-earned retirement, and a new Administrative Law Judge may later be called upon to interpret your Order.

We think the February 26 Order is clear. Complaint Counsel do not. If Your Honor is simply denying the Request, then there is no issue for us to address. But, if Your Honor

¹ Similarly, there would be no reason for an evidentiary sanction addressing the scope of Rambus's patent claims or the extent of any duty to disclose patents to JEDEC; all of the evidence of these objective facts is available and there is no allegation that any such evidence was not preserved by Rambus.

means to grant any portion of the Request, then Respondent again would ask that it be allowed to respond to what Complaint Counsel have filed.

Such a response would include the points already made, and also would suggest that Complaint Counsel might be asking Your Honor, perhaps simply through less-than-careful drafting,² to modify Your Honor's conclusions in such a way as to directly contradict the recent decision of the Federal Circuit in *Rambus Inc. v. Infineon Technologies AG, et al.* (decided January 29, 2003). Surely Complaint Counsel would not have done so deliberately, at least not without being explicit that they were doing so, and we are just as certain that Your Honor would not do so without giving Respondent a chance to be heard. But, for instance, Complaint Counsel might later argue that their proposed modified presumptions should be read to provide that patent applications pending while Rambus employees were attending JEDEC meetings covered some portion of either the SDRAM or DDR-SDRAM standard. Since the Federal Circuit arrived at exactly the opposite conclusion – holding, *e.g.*, that “this court has determined that substantial evidence does not support the finding that these applications had claims that read on the SDRAM standard” – we do not believe that Your Honor would make a contrary finding, and certainly would not do so in response to a request for clarification without first allowing us to be heard.

In sum, if Your Honor intends for your Order Denying Request for Clarification of February 27, 2003, to be read as more than a denial of the Request, Respondent requests leave to respond substantively to the Request and asks that a briefing schedule be set that will accommodate this request.

² As we all know, there is wisdom in the aphorism that “haste makes waste,” and perhaps Complaint Counsel's rush to file their Request and to have it ruled upon “immediately” is reflective of that point. And, candidly, Respondent worries that this Response might similarly have been too hastily prepared and that Complaint Counsel do not plan to, and would not in fact, make use of Your Honor's February 27 Order in the way that we are concerned they might.

DATED: February 28, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on February 28, 2003, I caused a true and correct copy of the *Memorandum in Opposition to Complaint Counsel's Request for Immediate Clarification of February 26, 2003 Order on Complaint Counsel's Motions for Default Judgment and for Oral Argument, and in Response to Order Denying Request for Clarification* to be served on the following persons by hand delivery:

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Administrative Law Judge
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